

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 United States of America,  
10  
11 Plaintiff,

12 v.

13 Kendrick Begay,

14 Defendant/Movant.

No. CV-12-08237-PCT-DGC (MHB)

**ORDER**

15 Following a jury trial in June 2006, Defendant Kendrick Begay was found guilty  
16 of two counts of first-degree murder and two counts of using, brandishing, or discharging  
17 a firearm in relation to a crime of violence. Doc. 8 at 4. Defendant was sentenced to life  
18 imprisonment on the murder counts, followed by consecutive sentences of 120 months  
19 and 300 months for the firearm convictions. *Id.*

20 Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence alleging that  
21 his trial counsel was ineffective in violation of his Sixth Amendment rights. Doc. 1. The  
22 Court referred the petition to United States Magistrate Judge Michelle H. Burns for a  
23 report and recommendation ("R&R"). Doc. 5. Judge Burns recommended that the Court  
24 deny the motion because Defendant failed to satisfy the standard articulated in *Strickland*  
25 *v. Washington*, 466 U.S. 668 (1984), with respect to any of the claims raised in his  
26 motion. Doc. 8 at 14.

27 Defendant filed objections to the R&R (Doc. 11) and a Motion to Expand the  
28 Record (Doc. 12). The government has also filed a Motion to Expand the Record.  
Doc. 14. For the reasons that follow, the Court will grant Defendant's Motion to Expand

1 the Record, deny the government's Motion to Expand the Record, and refer the case back  
2 to Magistrate Judge Burns to consider the expanded record.

3 **I. Standard of Review.**

4 Section 2555 requires the Court to grant a hearing "[u]nless the motion and the  
5 files and records of the case conclusively show that the prisoner is entitled to no relief[.]"  
6 28 U.S.C. § 2255(b) (West 2013). If a motion under section 2255 is "based on alleged  
7 occurrences entirely outside the record, which if true would support relief, the court must  
8 conduct a hearing on those allegations 'unless, viewing the petition against the record, its  
9 allegations do not state a claim for relief or are so patently frivolous or false as to warrant  
10 summary dismissal.'" *Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988) (quoting  
11 *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir.1982)). Courts may expand the  
12 record in considering section 2255 motions through discovery and documentary  
13 evidence. *Blackledge v. Allison*, 431 U.S. 63, 81-83 (1977); *see also* Rule 7 of the Rules  
14 Governing Section 2255 Proceedings. Whether to hold a hearing or conduct discovery  
15 are matters committed to the Court's discretion, *Machibroda v. United States*, 368 U.S.  
16 487, 495 (1962), as long as the Court gives the claim "careful consideration and plenary  
17 processing, including full opportunity for presentation of the relevant facts," *Blackledge*,  
18 431 U.S. at 82-83.

19 **II. Analysis.**

20 Defendant presents two documents for the Court's consideration in his Motion to  
21 Expand the Record – an FBI report summarizing an interview of Defendant conducted on  
22 March 28, 2002, and a printout of pawn transactions from T & R Market, Inc. dated  
23 April 12, 2002. Although it is unclear why Defendant did not submit these documents  
24 with his original motion, Defendant did contend that "[h]ad trial counsel conducted  
25 adequate investigation he would have been able to present the jury with admissible  
26 evidence tending to suggest that [Defendant] did not physically possess a semi-automatic  
27 rifle firing the sort of ammunition believed to have been used in this case[.]" Doc. 2 at  
28 11. Judge Burns found that Defendant "offered no basis for this claim." Doc. 8 at 13.

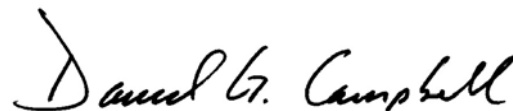
1 The Court finds this new evidence relevant to the consideration of Defendant's  
2 ineffective assistance of counsel claim. Under Rule 7(c) of the Rules Governing Section  
3 2255 Proceedings, the Court is required to "give the party against whom the additional  
4 materials are offered an opportunity to admit or deny their correctness." Because the  
5 government has filed a reply to Defendant's objection and its own motion seeking to  
6 expand the record, the Court finds the government has had such an opportunity. The  
7 government has not opposed Defendant's motion to expand the record. The Court will  
8 therefore exercise its discretion and grant the motion. *See* Rule 7(a) of the Rules  
9 Governing 2255 Proceedings.

10 The Court will deny the government's motion to expand the record as the  
11 documents submitted by the government as a part of its motion were also attached to its  
12 response to Defendant's initial motion in this case. Accordingly, these documents are  
13 already part of the record. *See* Doc. 6-1, 6-2, and 6-3.

14 The Court will refer the case to Judge Burns for consideration of the expanded  
15 record. The Court will deny Defendant's objections (Doc. 11) as moot. Defendant may  
16 file new objections after Judge Burns has updated her R&R in light of the expanded  
17 record.

18 **IT IS ORDERED** that Defendant's motion to expand the record (Doc. 12) is  
19 **granted** and the case is referred to Judge Burns for further consideration. It is further  
20 ordered that the government's motion to expand the record (Doc. 14) is **denied**.

21 Dated this 4th day of November, 2013.

22  
23  
24 

25 \_\_\_\_\_  
26 David G. Campbell  
27 United States District Judge  
28